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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman
JIM IRVIN
Commissioner
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Commissioner

Arizona Corporation Commission
DOCKETED

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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF
1996.

DOCKET NO. T-00000A-97-0238

NOTICE OF FILING

Qwest Corporation ("Qwest") hereby provides Notice of filing Qwest's Legal Brief
Regarding Resale in the above captioned proceedings.

RESPECTFULLY SUBMITTED this 16th day of March, 2001.

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BEFORE THE ARIZONA CORPORATE COMMISSION

In the Matter of the Investigation into
U S WEST Communications, Inc.'s
Compliance with § 271 of the
Telecommunications Act of 1996

Docket No. T-000000A-97-0238

QWEST'S LEGAL BRIEF
REGARDING RESALE

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INTRODUCTION

Qwest Corporation ("Qwest"), formerly U S WEST Communications, Inc., submits this brief to the Arizona Corporate Commission ("Commission") in support of its compliance with one of the competitive checklist items in Section 271(c)(2)(B) of the Telecommunications Act of 1996 (the "Act"): Checklist Item 14 (Resale).¹ As set forth in Qwest's testimony and demonstrated in this brief as well as in the various phases of the Workshop, Qwest meets the requirements of this checklist item.

Several parties filed testimony with this Commission and participated in the Workshop involving Qwest's compliance with Checklist Item 14.² Qwest made significant efforts to resolve disputes with participating CLECs and has modified its SGAT to accommodate all of its competitors' requests except two. In several instances, Qwest has agreed to modifications that were unnecessary for 271 compliance purposes, but which avoided disputes or promoted the competitive goals of competitive local exchange carriers ("CLECs"). Although two disputes remain, both issues relate to the mechanics of Qwest's contractual relationship with CLECs as opposed to whether Qwest complies with Checklist Item 14. Because Section 271 proceedings are not the proper forum for the creation of new requirements under the Act, the Commission should approve Section 6 of the SGAT if it comports with the Act, FCC regulations, and Commission rules, even if the CLECs would

¹ 47 U.S.C. § 271(c)(2)(B)(xiv).

² The following parties participated in Section 271 Workshops addressing these checklist items and filed comments or testimony in this proceeding regarding Qwest's compliance with Checklist Item 14 : AT&T of the Pacific Northwest, Inc. ("AT&T"), Covad Communications Co., Electric Lightwave, Inc., MCI WorldCom, Sprint Communications Co., and Rhythms Links, Inc.

prefer a slightly different execution of the parties' contractual relationship (which of course any party is free to pursue independently if it so elects).³

In passing the Act, Congress intended to "open[] up local markets to competition. . . ."⁴ The FCC has recognized that incumbent LECs and CLECs alike will benefit from competition resulting from operating efficiencies: "We believe they [economies of scale] should be shared in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices."⁵ Accordingly, Congress did not intend to create a vehicle by which new entrants could gain an unfair advantage by misusing the Act's requirements. Qwest submits that, at least with respect to these two resale issues, this is precisely what is occurring. CLECs in these proceedings have made demands upon Qwest that have no foundation in the Act, such as, for example, a demand for blanket indemnification from Qwest.

Despite the parties' ability to reach consensus on most issues, two issues have arisen that have eluded resolution. These issues are discussed below. As this brief demonstrates, neither of these disputed issues contradicts Qwest's showing that it complies with the requirements of Checklist Item 14.

³ See Memorandum Opinion and Order, *Application of SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 ¶¶ 22-26 (June 30, 2000) ("SBC Texas Order").

⁴ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 ¶ 167 (Aug. 8, 1996) ("Local Competition Order").

⁵ Id. ¶ 11.

CHECKLIST ITEM 14: RESALE

Section 271(c)(2)(B)(xiv) requires Bell Operating Companies ("BOC's") such as Qwest to make telecommunications services "available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3)."⁶ Pursuant to Section 251(c)(4), Qwest must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," and may not place any "unreasonable or discriminatory conditions or limitations" on the services that they offer for resale.⁷ Section 252(d)(3) provides that wholesale rates should be determined by the state commission based on retail rates less costs avoided by the LEC. Qwest has demonstrated through the Direct and Rebuttal Testimony of Lori A. Simpson that Qwest complies with these requirements and has implemented these duties through its SGAT and Commission-approved interconnection and resale agreements.

A. Indemnification (6.2.3.1 and 6.2.3.2)

Section 6.2.3 of the SGAT describes Qwest's quality of service obligations. AT&T has proposed that Qwest be required to indemnify CLECs virtually without limitation should Qwest fail to provision and repair each individual resold product in appropriate timeframes. There is no legal precedent for subjecting an incumbent to such liability in the context of an SGAT and it is certainly not a requirement of Checklist Item 14 that Qwest be subject to this sort of liability. Accordingly, Qwest is opposed to the addition of any broad indemnification responsibility as part of the SGAT.

⁶ 47 U.S.C. § 271(c)(2)(B)(xiv).

⁷ 47 U.S.C. § 251(c)(4)(A)-(B). The FCC rule regarding restrictions on resale is contained in 47 C.F.R. § 51.613. Subpart (a) of that rule permits specific restrictions on resale with respect to cross-class

Nevertheless, in an effort to accommodate AT&T's concerns regarding recourse for problems that are caused by services provided by Qwest, Qwest has agreed to modify its SGAT to provide CLECs a more focused indemnification that reflects CLECs legal obligation. Specifically, for those CLECs that are subject to a state's quality of service rules, Qwest has agreed to reimbursement or credits for payment the CLECs may make to their end-users pursuant to those rules, subject to the wholesale discount.⁸ Qwest believes that this approach is appropriate under the Act because it places the reseller CLECs at parity with Qwest's retail end-users.

The parties have reached an impasse with respect to several aspects of Section 6.2.3.1. First, AT&T objects to subpart (a) which provides that fines and penalties paid to CLECs are subject to the wholesale discount. For instance, if Qwest has violated its quality of service conditions, the SGAT requires Qwest to credit the reseller CLEC with the entire amount that the reseller CLEC paid Qwest for the service: Qwest's retail rate minus the wholesale discount. AT&T argues that Qwest should be forced to credit the CLEC the amount of money that the CLEC charged the end-user. AT&T's demand is unreasonable in that Qwest has absolutely no control over the amount a CLEC chooses to pay to its customer for service problems, and indeed, not circumscribing this remedy would open the door for potential abuse. Qwest will stand behind the quality of its services to the extent that its CLEC customers pay for them. In a resale context, Qwest's customer is the CLEC, not the CLEC's end-user. Quality of service violations attributed to Qwest should trigger a credit in the amount that Qwest received in exchange for providing that service, not an unknown

selling and short term promotions. Subpart (b) provides that additional restrictions are permitted if the incumbent proves to the state commission that they are reasonable and nondiscriminatory.

marked-up price over which Qwest has no control. To refund credit in the amount that exceeds what the CLEC paid Qwest would, in effect, establish a standard of care with respect to the end-user, as opposed to the party with which Qwest has its contractual relationship (i.e., the CLEC).

AT&T also takes issue with subpart (e) of Section 6.2.3.1, which provides: "In no case shall Qwest be required to provide duplicate reimbursement or payment to CLEC for any service quality failure incident." Qwest asserts that this provision is both reasonable and necessary. The Commission is currently involved in drafting a post-271 performance assurance plan ("PAP") that will subject Qwest to fines and penalties for quality of service violations. It is unreasonable and unduly punitive to subject Qwest to two redundant penalties for the same service problem. Absent the limitation contained in Section 6.2.3.1(e), CLEC resellers would be permitted to obtain a windfall by recovering twice: once through the PAP and once through the SGAT. Section 6.2.3.1(e) avoids this improper windfall to CLECs through double-recovery.

B. Marketing Services and Products to End-Users Who Mistakenly Call a Carrier is Within a Carrier's Right to Commercial Free Speech

The Act was intended to promote competition across all segments of the telecommunications industry – local and long distance alike. Despite this universal recognition, AT&T asserts that Qwest should not be permitted to market its products and services to all customers; specifically, CLEC customers who mistakenly contact Qwest's business or repair office. By definition, denying Qwest the ability to market to a subset of consumers constitutes a limitation on competition. AT&T cites no legal authority in support

of this position. To Qwest, AT&T's position imposes an inappropriate restriction on commercial free speech.

AT&T demands that carriers discuss their products and services only with customers who call them specifically "seeking such information."⁹ AT&T's restrictions would prohibit carriers from marketing services and products unless the caller specifically asks for such information. In response to CLEC concerns, Qwest made several SGAT revisions to Sections 6.4.1 and 6.6.3 to address marketing issues. For example, Qwest has proposed that *both carriers* must refer such callers to their current local service provider, and that *both carriers* must refrain from making disparaging comments about that end-user customer's current provider. The proposed modification appropriately makes the requirements in this section reciprocal; that is, they apply to CLECs and Qwest when either party receives misdirected calls from the other's end-users. Furthermore, AT&T cites no authority for concluding that Qwest may not be allowed to discuss its products and services with callers to Qwest's offices, so long as those discussions are not discriminatory toward CLEC or its services.

Nothing, however, should curtail any LEC's ability to disseminate truthful, accurate information about their products and services. The First Amendment to the Constitution requires nothing less.

Commercial speech is "expression related solely to the economic interests of the speaker and its audience."¹⁰ If commercial speech is accurate, nonmisleading, and about a

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Kenneth L. Wilson's Testimony, Transcript Volume VII at 1383, February 13, 2001.

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Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349 (1980).

lawful activity, then the First Amendment protects its dissemination.¹¹ Constitutional protection for commercial speech is premised upon core First Amendment values and the free enterprise system:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹²

Protection of commercial speech is vital not only to Qwest and CLECs as speakers, but also to consumers as the recipients of information. Freedom of commercial speech allows the decision-makers (in this case, end-user customers) to be "intelligent" and "well-informed."¹³ Even a regulated public utility enjoys full protection of its commercial speech, and any regulation promulgated by a public service commission must be invalidated if it violates that protection.¹⁴ As the Court in *Central Hudson* stated, "[w]e have recognized that the speech of heavily regulated businesses may enjoy constitutional protection . . . Consolidated Edison's position as a regulated monopoly does not decrease the informative value of its opinions on critical public matters."¹⁵

The marketing of Qwest's products and services is commercial speech, as the ability to freely express Qwest's offerings is to the economic benefit of both Qwest and its potential customer. Qwest proposes to communicate only accurate, nonmisleading information, to

¹¹ 447 U.S. at 561-64, 100 S. Ct. 2349-50.

¹² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S. Ct. 1817, 1827 (1976).

¹³ *Virginia Pharmacy*, 425 U.S. at 765, 96 S. Ct. at 1827.

¹⁴ *Central Hudson*, 447 U.S. at 534 n.1, 100 S. Ct. at 2331 n.1.

which consumers need access to make informed decisions regarding who they will choose as their service provider. End-users who mistakenly contact Qwest will not be misled into believing that Qwest is the only local service carrier – to the contrary, they will already be using the services of another LEC.

Qwest's right to speak involves much more than the right to respond to questions by customers; it also involves the right to affirmatively promote its products and services whether or not customers have sought out Qwest to request such information. In *Edenfield v. Fane*,¹⁶ the United States Supreme Court stated:

In the commercial speech context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. A seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact. *Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service* and allows both parties to discuss and negotiate the desired form for the transaction or professional relation.¹⁷

The fact that other means of speech are available to Qwest, such as initiating its own calls to customers, does not justify limiting Qwest's ability to market its services to customers who call Qwest. For example, a bill insert or a telemarketing campaign may not reach the same group of customers who initiate calls to Qwest. That is one chief reason why "one is not to

¹⁵

Id.

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507 U.S. 761, 766, 113 S. Ct. 1792, 1797-98 (1993); see also *Virginia Pharmacy*, 425 U.S. at 757 n.15, 96 S. Ct. at 1823 n.15. (There is "no general principle that freedom of speech may be abridged when a speaker's listeners could come by his message by some other means, such as seeking him out and asking what it is."); *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862 (1943) (The first amendment protects right of solicitor to knock on door to summon inhabitants, rather than simply soliciting those who affirmatively invite speaker inside the house.).

¹⁷

Id.

have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”¹⁸ As stated by the Supreme Court in *City of Cincinnati v. Discovery Network, Inc.*,¹⁹ the fact that a speaker may have alternative methods to disseminate its speech does not “minimize the significance of the burden” upon Qwest’s rights to free speech, and does not relieve the party seeking to impose the restriction from satisfying the test set out in *Central Hudson*. Moreover, in *Linmark Associates, Inc. v. Township of Willingboro*,²⁰ the Court rejected a ban on “For Sale” signs, despite the fact that the ban left open alternative channels of communication. The Court observed that advertising real estate in newspapers or agent listings could not *effectively* substitute for posting “For Sale” signs – in part because such alternatives were “*less likely to reach persons not deliberately seeking sales information.*”²¹

The *Central Hudson* test is for an intermediate level scrutiny. First, the Commission must determine whether the speech concerns lawful activity and is not misleading. Second, the Commission inquires whether the government interest asserted in support of banning the speech is “substantial.” If these answers are “yes,” then the Commission must determine whether the proposed limitation “directly advances the government interest,” and whether the

¹⁸ *Schneider v. State*, 308 U.S. 147, 163, 60 S. Ct. 146, 151-52 (1939); see also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556, 95 S. Ct. 1239, 1245 (1975) (same).

¹⁹ 507 U.S. 410, 427, 113 S. Ct. 1505, 1515-16 (1993) (striking down a news rack ban even though the same commercial magazines could be distributed by other means).

²⁰ 431 U.S. 85, 97 S. Ct. 1614 (1977).

²¹ 431 U.S. at 93, 97 S. Ct. at 1618 (emphasis added); see also, *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S. Ct. 2038 (1994) (Prohibition on residential signs invalid, even though it did not prevent homeowners from “taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one’s house with a handheld sign,” or even from displaying flags with written messages.).

restriction on speech is "not more extensive than is necessary to serve the government's interest." AT&T's proposed restrictions on Qwest's speech do not pass this test.

The Commission's purpose and interest in regulating the provision of telecommunications services is to promote competition and protect consumers. The record in these proceedings is devoid of any showing that limiting the *particular speech that Qwest wants to disseminate* during customer-initiated calls to Qwest advances the state interest of fostering a competitive market or protecting consumers. Here, AT&T carries the burden of showing that limiting Qwest's commercial speech advances the state's interest "*in a direct and material way.*"²² This element "is not satisfied by mere speculation or conjecture"; rather, AT&T must demonstrate – actually prove – that "the harms it recites are real and that its restriction will alleviate them to a material degree."²³

In fact, AT&T's proposed restrictions affirmatively *disserve* Arizona's goals. Prohibiting Qwest or any other carrier for that matter from asking consumers whether they want to hear about Qwest's services will not further the operation of a competitive market. Similarly, prohibiting an accurate description of Qwest's telecommunications services, or the price of Qwest's service, does not foster a competitive environment. It is axiomatic that competition is furthered through the exchange of full information on price, discounts, conditions, and product availability because this type of information gives consumers the tools to make informed choices. Limiting commercial speech limits informed choices. As stated by the Supreme Court in its recent discussion of commercial speech, a prohibition

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Edenfield, 507 U.S. at 767, 113 S. Ct. at 1798; *Rubin*, 514 U.S. at 486-87, 115 S. Ct. at 1592.

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Edenfield, 507 U.S. at 770-71, 113 S. Ct. at 1800; see also, *Rubin*, 514 U.S. at 487, 115 S. Ct. at 1592.

against price advertising “will tend to mitigate competition and maintain prices at a higher level than would prevail in a competitively free market.”²⁴

AT&T’s position assumes that customers are incapable of deciding for themselves whether they even want to hear what Qwest has to say, and if told, might find the message persuasive. The Supreme Court repeatedly has rejected these paternalistic arguments as a basis for sustaining bans on truthful, nonmisleading, and lawful commercial speech. They should likewise be rejected here.

More to the point, AT&T’s position rests on speculation. AT&T did not even attempt to put anything into the record (beyond speculation) about the harms that could flow from Qwest marketing to CLEC customers. As the United States Supreme Court has instructed, “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”²⁵ That burden “is not satisfied by mere speculation and conjecture,”²⁶ or by “anecdotal evidence and educated guesses.”²⁷ Qwest’s supposed advantage and so-called “captive audiences” are irrelevant under the First Amendment. Indeed, the classic case of a “captive audience” are customers of electric utilities, yet the Supreme Court has made clear

²⁴ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505, 116 S. Ct. 1495, 1509 (1996) (plurality opinion).

²⁵ *Edenfield*, 507 U.S. at 770-71, 113 S. Ct. at 1800 (1993).

²⁶ *Id.*, 507 U.S. at 770, 113 S. Ct. at 1800.

²⁷ *Rubin*, 514 U.S. at 490, 119 S. Ct. at 1593.

that electric utilities have full First Amendment rights in communicating with their customers.²⁸

In sum, the Commission should reject AT&T's proposed language that would limit Qwest's ability to market its products and services to end-users who call Qwest inadvertently. Regardless of the caller's intent, Qwest's ability to communicate truthful and nonmisleading information to him or her is protected by the First Amendment right to free commercial speech.

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See *Central Hudson*, 447 U.S. at 567-68, 100 S. Ct. at 2352 (1980) ("Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment . . . [A]ppellant's monopoly position does not alter the First Amendment's protection for its commercial speech."). See also *Pacific Gas*, 475 U.S. at 17 n.14, 106 S. Ct. at 912 n.14 (1986) (plurality opinion) (expressly rejecting the argument that "appellant's status as a regulated utility company lessens its right to be free from state regulation that burdens its speech"); *Consolidated Edison*, 447 U.S. at 534 n.1, 100 S. Ct. at 2331 n.1 (1980) ("We have recognized that the speech of heavily regulated business may enjoy constitutional protection . . . Consolidated Edison's position as regulated monopoly does not decrease the informative value of its opinions on critical public matters.").

CONCLUSION

Qwest has demonstrated that it meets the requirements in the Act and FCC orders for compliance with Checklist Item 14 in the direct and rebuttal testimony of Lori A. Simpson, as well as the evidence presented during the workshop itself. The CLECs who commented on the checklist items failed to rebut Qwest's *prima facie* showing of compliance. Accordingly, Qwest requests that the Commission verify Qwest's compliance with Section 271(c)(2)(B)(xiv) of the Act with respect to Checklist Item 14.

DATED this 16th day of March, 2001.

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